No. [illegible]

In the Supreme Court of the United States

October Term, 1944

[illegible]

[illegible]

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF [illegible]

BRIEF FOR THE [illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 805

WILLIAM FRASER, ET UX., PETITIONERS

v.

P. M. BARTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

No opinion was rendered by the district court. The opinion of the Circuit Court of Appeals (R. 977–987) is reported in 145 F. (2d) 139.

JURISDICTION

The judgments of the court below in the consolidated causes were entered on October 3, 1944 (R. 975–976). The petition for a writ of certiorari was filed January 2, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. 347).

QUESTIONS PRESENTED

The United States intervened in this suit as a cross-complainant. Its only interest is in recovering the marketing penalty imposed by the Agricultural Adjustment Act of 1938 as amended, on cotton marketed in excess of the producer's farm marketing quota. This brief will therefore deal with only the questions presented by the petition for writ of certiorari which relate to the right of the United States to recover such penalty. These questions are:

(1) Whether petitioner William Fraser was liable for payment of the marketing penalty claimed by the Government.

(2) Whether the court below correctly interpreted a Tennessee statute dealing with privileged communications between husband and wife as not extending to communications and acts in furtherance of a fraud.

STATUTE AND ADMINISTRATIVE REGULATIONS INVOLVED

The pertinent provisions of the Agricultural Adjustment Act of 1938, as amended, and of regulations issued thereunder by the Secretary of Agriculture are set forth in the Appendix, *infra*, pp. 12–14.

STATEMENT

P. M. Barton brought suit in the United States District Court for the Western District of Tennessee on behalf of himself and associates against

William Fraser and G. H. Britton, individually and doing business as G. H. Britton Cotton Company, for an accounting of the money due the plaintiffs on account of approximately 1,859 bales of cotton sold by the plaintiffs to the defendants, and to require the defendants to show why they had not paid to the United States the penalty on the marketing of the cotton prescribed by the Agricultural Adjustment Act of 1938, as amended, or had not placed in escrow a sum sufficient to pay such penalty, in accordance with the agreement of the parties (R. 3–9). Fraser and Britton claimed that under the terms of sale the sellers of the cotton assumed liability for any penalty due the United States under the Agricultural Adjustment Act of 1938 (R. 63–64, 86).

The United States intervened as a cross-complainant upon the ground that the cotton involved in the litigation was cotton marketed in excess of the farm marketing quotas fixed under the provisions of the Agricultural Adjustment Act of 1938, as amended, and that the cotton was subject under the Act to a penalty of 7¢ a pound payable to the United States, and that both the buyers and sellers of the cotton were liable to the United States for this penalty but had failed and refused to make the required payment (R. 10, 12–13). The cross-complaint averred that Fraser had received the proceeds of the sale of the cotton but had declined to give any information as to the whereabouts of

the proceeds (R. 14–15). The cross-complaint also averred, on the basis of an investigation which had been made, that the money received by Fraser from sale of the cotton had been deposited in a bank safe deposit box rented jointly by him and G. W. Fraser (his wife); that this money, which included funds belonging to the United States as a penalty, was being held and concealed; that Britton and the two Frasers were insolvent; and that unless the money so withheld and concealed was impounded the United States would be irreparably injured (R. 15–16). The court, as prayed by the Government, issued a temporary injunction restraining Britton and the Frasers from disposing of or concealing the proceeds from the sale of the Barton cotton or the contents of the Fraser's bank deposit box (R. 17–18, 21–22).

Upon application of the United States pursuant to Rule 26 of the Rules of Civil Procedure, the court issued an order allowing the taking of the deposition of William Fraser and issued a subpoena *duces tecum* requiring him to produce certain documents relating to the purchase and sale of 1,859 bales of cotton (R. 29–30). In his deposition William Fraser testified that, apart from the proceeds of the cotton sold by him, he did not have property subject to execution sufficient to satisfy any judgment against him for the penalty on this cotton (R. 375). He stated that he knew the location of approximately $30,-

000 of this money but refused to tell where it was upon the ground that his answer might involve the disclosure of privileged communications between husband and wife (R. 372–374). The court having directed the witness to answer, Fraser stated that his wife had possession of some $32,000 of the money but that he did not know where it was (R. 376, 379–381, 385–386).

The deposition of Mrs. Fraser was then taken and she admitted having on her person $27,000 in currency coming from the sale of the Barton cotton (R. 400). She testified that her husband had turned the money over to her to take care of, together with one $500 and two $1,000 bonds (R. 403–404). The parties then went before the court and it issued an order directing Mrs. Fraser to pay to the clerk of the court all of the proceeds derived from the sale of the Barton cotton which were in her possession, to be held by the clerk pending determination by the court of the rights of the respective parties in such proceeds (R. 56–57, 407–410). Mrs. Fraser thereupon turned over to the clerk of the court the $27,000 in currency and $2,500 in Government bonds, which were admitted to be proceeds from sale of the Barton cotton (R. 412, 414).

At the trial the evidence was conflicting concerning the terms of the agreement for the sale of the cotton, but the district court concluded that the buyers, Fraser and Britton, had agreed to as-

sume liability for payment of the marketing penalty (R. 151–152). Judgment was entered in favor of the United States for the amount of the penalty, $55,762.14, against the defendants Fraser and Britton, jointly and severally, against which there was set off $33,461 held by the clerk of the court,[1] which he was directed to pay to the United States in partial satisfaction of its claim (R. 161, 163–164). The court also adjudged that the plaintiffs in the suit, the sellers of the cotton, were likewise individually liable to the United States for the marketing penalty in proportion to their respective interests in the cotton, against which was set off their proportionate parts of the $33,461 in the registry of the court (R. 161–163, 164–166).

On separate appeals by William Fraser, Mrs. William Fraser, and by the original plaintiffs in the suit, the Circuit Court of Appeals approved the determination and rulings of the district court and affirmed its judgment (R. 975–987).

ARGUMENT

I

Petitioners contend (Pet. 18–19) that the seller from whom Fraser and Britton bought, the Three

[1] In addition to the cash and Government bonds deposited with the clerk of court by Mrs. Fraser, Britton and Barton respectively surrended to the clerk Government bonds and a cashier's check representing proceeds from the sale of cotton on which no marketing penalty had been paid (R. 58–61).

Way Land Company,[2] was the first purchaser from the growers of the cotton and that Fraser and Britton were therefore not liable, as purchasers, for the cotton marketing penalty. It was stipulated that the cotton was produced on and marketed from lands owned and farmed by the original plaintiffs (R. 106), and it is clear that the petitioners knew that they were purchasing penalty cotton from producers and not from an intervening purchaser (R. 107, 108, 434, 496, 690, 705–707). Furthermore, the contention was not made in the court below (R. 179–187) and will therefore not be considered by this Court on certiorari (*Burnet* v. *Commonwealth Imp. Co.*, 287 U. S. 415, 418).

Petitioners also contend (Pet. 16–18) that the court below erred in holding that the agreement under which the cotton was sold made the buyers liable for the marketing penalty. But this is a question of fact in which two lower courts have concurred. Certiorari will not be granted simply to review the evidence or the inferences to be drawn from it (*General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178) and, in the absence of a showing of clear error, this Court

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[2] For convenience, we referred in our statement to Barton as the seller of the cotton. The Three Way Land Company, the nominal seller, was in process of dissolution at the time of sale and Barton, its president and one of its three stockholders, had complete power to liquidate its assets (R. 149, 557, 590).

accepts findings in which two courts have concurred (*Pick Mfg. Co.* v. *General Motors Corp.*, 299 U. S. 3, 4).

In the second place, the buyers of the cotton were liable under the statute for the marketing penalty irrespective of the terms of the agreement under which the cotton was sold. Section 372 of the Agricultural Adjustment Act of 1938 (*infra*, p. 13) expressly provides that the penalty with respect to the marketing of cotton "shall be collected by the buyer" and that all penalties shall be remitted to the Secretary of Agriculture "by the person liable for the penalty." The regulations issued under the Act by the Secretary (Sec. 722.343 (b), *infra*, p. 14) provide that the penalty with respect to the marketing of cotton by sale "shall be collected by the buyer at the time of sale."[3] The liability of the buyer for the penalty is emphasized by the provision in the regulations that the penalty due upon cotton "marketed in processed form" shall be paid by the producer or, if the producer and buyer so agree, by the buyer (*ibid*). As stated by the court below (R. 979), there must have been purpose and not inadvertence in thus providing with respect only to processed cotton that the party required to make

[3] The regulations also provide (Sec. 722.343 (d), *infra*, p. 14) that the penalty may be collected by the buyer either by deducting the amount thereof from the purchase price of the cotton or by receiving the amount thereof from the producer.

payment of the penalty might be fixed by agreement between buyer and seller.

Petitioners did not challenge in the court below the trial court's finding that Fraser and Britton knew that the cotton which they were purchasing was subject to the marketing penalty (R. 154, 181–185). It was also stipulated that Fraser and Britton made no report to the Government of their purchase of the cotton (R. 108), although required by law to make such report.[4]

II

Petitioners contend (Pet. 19–23) that the testimony which Fraser was required to give concerning his disposition of the proceeds derived from the sale of penalty cotton was inadmissible under a Tennessee statute barring testimony by husband or wife as to any matter which occurred between them in consequence of the marital relation, and that the money and bonds which Mrs. Fraser paid into court as a result of such testimony should therefore have been returned.

Petitioners do not dispute the statement by the court below (R. 983) that there are no Tennessee decisions construing the application of the statute to acts done in furtherance of a fraud. The court, in concluding that the testimony obtained

[4] As to their liability to report, see Section 373 (a) of the Act (7 U. S. C. 1373 (a)) and Sec. 722.350 (a), (b), (c), (j) of the Secretary's regulations (7 C. F. R., 1941 Supp., pp. 805, 806).

from Fraser was not within the bar of the statute, considered the public policy lying at the foundation of the rule making communications between husband and wife privileged and also considered decisions in other jurisdictions holding that courts, for the purpose of unearthing and exposing fraud, will permit testimony by husband or wife as to conversations between them concerning the transaction (R. 982–984).

The court below applied well-settled principles in determining the meaning of the statute in the absence of any guiding decision by the courts of the State. This Court will not set aside a ruling by the lower federal courts on a question of local law except on a plain showing of error. *Palmer* v. *Hoffman,* 318 U. S. 109, 118, rehearing denied, 318 U. S. 800; *MacGregor* v. *State Mutual Life Ass. Co.,* 315 U. S. 280, 281.

Since the decision below was rested on a ruling as to local law not shown to be in conflict with the law of the State, it is unnecessary to consider certain additional reasons which the court advanced in support of its ruling, namely, that Fraser had waived his privilege and that, in matters of remedial as distinguished from substantive rights, federal courts of equity are not bound to apply the law of the State of trial (R. 984–985).

Aside from the question of privilege already discussed, the order requiring payment to the court, pending final decision in the case, of the proceeds

from the sale of penalty cotton in the possession of persons unable, apart from such proceeds, to satisfy judgment against them, was clearly valid. *Mulford* v. *Smith,* 307 U. S. 38, 45; *H. P. Hood & Sons* v. *United States,* 307 U. S. 588, 591.

CONCLUSION

The decision below is not in conflict with that of any other circuit court of appeals or of this Court and no question meriting review by this Court is presented. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1945.